FEIN & FEIN

910 SEVENTEENTH STREET, N.W. SUITE 800
WASHINGTON, D.C. 20006

TELEPHONE: 202-775-1776
FACSIMILE: 202-478-1664
WWW.FEINANDFEIN.COM

February 5, 2003

Electronic Filing

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TWB-204
Washington, D.C. 20554

RE: In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket Nos. 01-338, 96-98 and 98-147

Dear Ms. Dortch:

On February 5, 2003, the attached letter by Bruce Fein was sent to the Chairman and Commissioners.

One copy of this Notice is being submitted for each of the referenced proceedings in accordance with the Commission's rules.

Sincerely,

Bruce Fein

(Attachment)

FEIN & FEIN

910 SEVENTEENTH STREET, N.W. SUITE 800
WASHINGTON, D.C. 20006

TELEPHONE: 202-775-1776
FACSIMILE: 202-478-1664
WWW.FEINANDFEIN.COM

February 5, 2003

EX PARTE

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street SW, Suite TW-8B201
Washington, D.C. 20554

RE: In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket Nos. 01-338, 96-98 and 98-147

Dear Chairman Powell:

As former general counsel of the Federal Communications Commission and contributing editor to Tech Central Station, I am writing to address the role of States concerning the unbundling of network elements (UNEs) under the Telecommunications Act of 1996 as local exchange service transitions from the inherited monopolies of incumbent local exchange carriers (ILECs) to a marketplace featuring a multiplicity of competitors.

Past months have witnessed a cascade of clashing voices. Some envision the States as foot soldiers of the federal government to assist in administering (as opposed to adjudicating legal disputes arising from) unbundling rules promulgated by the Federal Communications Commission. That conception might by styled the federal Leviathan vision. Others have paid homage to leaving State public utility commissions (PUCs) independent authority to devise and enforce unbundling rules tailored to local geographic and customer class markets sporting varied competitive landscapes. The PUCs, however, would consider UNE guidelines ordained by the FCC in their unbundling proceedings and decrees.

I respectfully submit that a humble federal stance on UNEs is both compelled by the Constitution's time-honored federalism and saluted by principles of enlightened government. The latter presumptively favor local solutions to local problems; and, they prize the wisdom in the science of government distilled by

experimentation in 50 State laboratories. These federalism teachings are gospel in the White House.

The FCC encounters constitutional limits in forging strategies to implement the UNE obligations of ILECs under section 251(c)(3) of the Communications Act of 1934, 47 U.S.C. 251(c)(3). To summarize, the Constitution prohibits compelling or commanding state public utility commissions (PUCs) to administer or enforce (as opposed to adjudicating disputes arising under) unbundling rules promulgated by the Commission. The PUCs cannot be required to gather competitive data for the Commission regarding particular geographic or customer class markets to assist it in establishing "necessity" and "impairment" tests for unbundling in heterogenous local markets as mandated by USTA v. FCC, 290 F. 3d 415 (D.C. Cir. 2002). Neither may PUCs be directed to employ unbundling standards promulgated by the Commission in issuing state unbundling orders to ILECs. Under FERC v. Mississippi, 456 U.S. 742 (1982), however, the Commission could promulgate voluntary guidelines for PUCs to consider in their unbundling decisions. Moreover, FERC approves the use of PUCs to adjudicate disputes arising under the 1996 Telecommunications Act between ILECs and competitive local exchange carriers (CLECs) similar to disputes the PUCs adjudicate under state law.

The Commission has been precluded under the 1996 Act from preempting PUCs from ILEC unbundling rules that satisfy the statutory floors of necessary, impairment, nondiscrimination, and reasonableness. 47 U.S.C. § 251(c)(3), (d)(2), & (d)(3). Further, such preemption would be folly. State experimentation with unbundling rules is essential to successful transitions to competitive local exchange markets. Temporary assistance to CLECs through leased UNEs and otherwise, to duplicate marketplaces that would have flowered absent a century of government-created local monopolies, is more an art than a science. At present, empirical data on the issue is sparse, thus making a nationwide solution foolhardy. Varied State approaches will provide the experience needed to show whether local exchange markets are generally unique and thus resist national standards. The experimentation would also promote the discovery of an empirically confirmed preferred solution extrapolated from 50 different State trials that could be exported to all States or considered for adoption by Congress or the Commission.

In Printz v. United States, 521 U.S. 898 (1997), the Supreme Court strictly circumscribed the power of the federal government to

compel state officials or agencies to administer or enforce federal laws or programs. At issue was a provision of the Brady Handgun Violence Prevention Act. It directed chief law enforcement officers (CLEOs) in various localities to conduct background checks on prospective gun purchasers within 5 days to determine whether a prohibited purchaser category (such as convicted felons) would make a sale illegal. Justice Antonin Scalia, writing for the Court, declared that state sovereignty protected by the Constitution forbids the Federal Government from compelling States, state officials, or state agencies either to enact or to administer (in contrast to adjudicating) a federal regulatory program. The Brady law violated that injunction by hijacking CLEOs from state duties to assist the enforcement of a federal law.

Printz was no aberration. In District of Columbia v. Train, 521 F. 2d 971, 994 (D.C. Cir. 1975), the court of appeals held unconstitutional regulations of the Environmental Protection Agency directing States to prescribe auto emissions testing, monitoring and retrofit programs, and to designate preferential bus and carpool lanes to achieve Clean Air Act objectives. After the Supreme Court granted certiorari, the EPA backed down, rescinding some rules and conceding the invalidity of others. The case was thus remanded for mootness. EPA v. Brown, 431 U.S. 99 (1977) (per curiam).

In New York v. United States, 505 U.S. 144 (1992), the Court held unconstitutional provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985. They compelled States either to enact legislation to dispose of nuclear waste generated within their borders, or to take title to and possession of the waste. Both options shipwrecked on the constitutional doctrine that States may not be required by Congress to enact or administer a federal program.

Most analogous to the Commission's unbundling issue is FERC v. Mississippi, supra. There the Court narrowly upheld a federal requirement that State authorities regulating electric utilities consider for possible adoption six federally enumerated approaches to conserving energy. But Justice Harry Blackmun, speaking for the majority, hinted that the constitutional limit on federal commandeering of State agencies would have been breached with any greater encroachment on state policy or administrative choices: "[T]his Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations." 456 U.S. at 761-762. Moreover, none of the five Justices in the FERC

majority sits on the Court at present, while dissenters Sandra Day O'Connor and William H. Rehnquist do. The latter, coupled with the strong federalism voices of Justices Scalia, Antony Kennedy, and Clarence Thomas, make a majority inclined either to overrule the case or narrowly confine the precedent to its facts.

FERC, however, sustained the federal directive to PUCs to resolve disputes between qualifying cogeneration and small power production facilities and electric utilities arising under the Public Utility Regulatory Policies Act of 1978, because the disputes were generically indistinguishable from regulatory quarrels between private parties that the state agencies routinely entertained under state law. The precedent thus casts no cloud over the adjudicatory role of PUCs in resolving disputes between ILECs and CLECS under the Telecommunications Act. 47 U.S.C. § 251.

Since Printz, the Supreme Court has been unwavering in defending State sovereignty from federal encroachment both through broad interpretations of the Eleventh Amendment and confining interpretations of congressional power under section 5 of the Fourteenth Amendment. See, e.g., United States v. Morrison, 529 U.S. 598 (2000); City of Boerne v. Flores, 521 U.S. 507 (1997); Alden v. Maine, 527 U.S. 706 (1999). Given this high tide of federalism jurisprudence, it is inconceivable that the High Court would sustain any Commission mandate to PUCs either to employ or to administer federal unbundling rules (as contrasted with adjudicating private disputes arising under the Commission's rules or the 1996 Act itself). At most, under the umbrella of FERC, the Commission could urge PUCs to entertain federal unbundling standards in establishing State-required UNEs for leasing by ILECs to CLECs.

The Commission is also barred under the 1996 Act from preempting PUC unbundling rules that do not conflict with subsections (c)(3) or (d)(2) of section 251. Subsection (d)(3) of that section, entitled "Preservation of State access regulations," enjoins the Commission from preempting PUC regulations or policies that are "consistent with the requirements of [section 251]." In addressing unbundling, section 251 sets a floor for PUCs, i.e., the regulations must at a minimum require the unbundling of network elements to the extent necessary for CLECs and whose unavailability would impair the CLECs in providing the service they seek to offer; and, the regulations must establish "nondiscriminatory access to network elements on an unbundled basis at any feasible point on rates, terms and conditions that are just, reasonable, and

nondiscriminatory . . . [and] that allows requesting carriers to combine such elements in order to provide such telecommunications service." Any PUC rules that prescribe more extensive unbundling are shielded from the Commission's preemptive power under subsection (d)(3).

Finally, enlightened government dictates that the Commission desist from seeking to oust PUCs from independent unbundling rules and standards. Deregulating telecommunications is a unique challenge. All previous modern deregulation initiatives concerned industries without incumbent monopolists where the mischief of regulation was shared equally by competitors: airlines, railroads, trucking, busing, banking, brokerage commissions, and natural gas production. Lifting the heavy hand of government from the marketplace left competitors equally fit to compete. ILEC monopolists, in contrast, must be provisionally regulated in their unbundling of network elements and otherwise to achieve market conditions that were thwarted by a century of government-ordained monopolies. As the court of appeals observed in USTA, variations in the competitive landscape are routine between discrete geographic and customer class markets. Accordingly, the most propitious rules for unbundling network elements will also vary, as will the need for continued ILEC regulation. Both issues can be most adeptly handled by PUCs on the scene. This federalist solution to unbundling is especially warranted because breaking ILEC monopolies is uncharted territory where the benefits of experimentation in 50 state laboratories are at their zenith. As Supreme Court Justice Louis D. Brandies lectured in New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932)(dissenting): "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

In USTA, Judge Stephen Williams, writing for the court of appeals, reproached the Commission's Local Competition Order embracing nationwide impairment standards concerning UNEs for twofold reasons: failing to make UNEs expand or contract according to the competitive conditions in each local marketplace or customer category; and, neglecting to differentiate between cost disparities between ILECs and CLECs customarily confronted by new entrants and those derived from economies of scale over the entire extent of the market where new facilities would be economically wasteful. The FCC might answer Judge William's scoldings by maintaining its Order as presumptively fitting local market and customer conditions but

crowning ILECs with a right to petition a PUC to show with regard to particular CLEC UNE requests that a denial would not impair competition or the CLEC's ability to provide the services it seeks to offer. The ILECs would shoulder the burden of proof justifying the exception to the Local Competition Order. Such exact tailoring of each unbundling decision to local market conditions would seem legally invulnerable and administratively inviting.

In any event, the 1996 Act requires, and the science of government supports, that the Commission acknowledge the independent power of PUCs to compel ILECs to unbundle further than the necessity-and-impairment standard of the federal statute. It sets a floor, not a ceiling, on unbundling. The Commission should confine itself to issuing guidelines for consideration by PUCs. And it should empower PUCs to adjudicate exceptions to the Commission's Local Competition Order based on claims of non-impairment requested by ILECs.

Sincerely,

Bruce Fein

CC: Commissioner Kevin J. Martin
Commissioner Kathleen Q. Abernathy
Commissioner Jonathan S. Adelstein
Commissioner Michael J. Copps
Office of the Secretary (via electronic filing)